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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 339

SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY, APPELLANTS,

vs.

CITY OF DURHAM, APPELLEE

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA

Brief of Appellee

I.

STATEMENT OF FACTS

This proceeding was brought in the Superior Court of Durham County, North Carolina, for a mandamus to compel the Railway Companies, Appellants, to eliminate a grade cross-

ing of their tracks with Chapel Hill Street in the City of Durham. The proceeding was made returnable before the Judge of the Superior Court on a certain day in accordance with the statute of the State. Chapel Hill Street is one of the main streets or thoroughfares located in said City, connecting the northern and southern portions of the City and leading from Durham to Chapel Hill—the seat of the University of the State; that the three railways, appellants, have tracks crossing at grade Chapel Hill Street, on which tracks are operated both passenger and freight trains, and switching engines and trains; that within a radius of 800 yards of the street crossing are located the freight depots of the railway companies, large tobacco plants and factories, ice and power plants, flour mills, hosiery mills, all of which are served with side or spur tracks connected with the main-line tracks of the railway companies and over which are constantly, during the day and night, operated passenger and freight trains and switching engines and cars or trains; that several accidents had occurred at this crossing, in which persons, animals and vehicles had been injured; that the City of Durham had caused to be made a record of the street traffic over and along said street at said grade crossing, which record is attached as exhibibits to the complaint or petition, showing that an average of nearly 4000 pedestrians and bicycles, more than 500 horse drawn vehicles, more than 2000 passenger automobiles, more than 350 delivery wagons, more than 100 heavy trucks and more than 200 street cars used the street at this crossing between five o'clock in the morning and eleven at night, and that between these hours traffic over the street was interrupted more than 100 times by trains and engines moving over the railway tracks; that the governing authorities of the City of Durham, finding that the continued maintenance of this grade crossing was a great inconvenience and an increasing menace to the public safety, that it seriously interrupted and impeded traffic along said street, employed an expert engineer to advise

the city if and how it were practicable and possible to eliminate said grade crossing and separate the street from the railways tracks; that said engineer recommended to the governing authorities that the grade crossing could be eliminated and that the best method was to pass the street under the railway tracks; that the City authorities invited the railway companies to meet with the representative of the City for a discussion of the matter and many conferences were held but no definite or satisfactory agreement could be reached, whereupon on March 20, 1922, the governing authorities of the City adopted the following Ordinance:

> "Whereas, the Greensboro and Goldsboro line of the Southern Railway crosses Chapel Hill Street at grade, near the center of the City of Durham, North Carolina, and,
>
> "Whereas, the right-of-way of said railway at that location is two hundred feet wide, the same being occupied by the tracks of the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, certain of which said tracks are sometimes used by equipment of other railway companies, tenants of said Southern Railway Company, which location is a part of the freight and switch yard of two of said railway companies, where the shifting of engines, cars and trains, both freight and passenger, is of constant practice during the hours of day and night, all of which is in addition to the movement of through freight and passenger trains over said tracks, and
>
> "Whereas, approximately 120 street cars, 260 heavy trucks, 170 delivery wagons, 788 passenger automobiles, 400 horse drawn vehicles with their passengers, drivers and operators, together with 3,600 pedestrians, including many school children, use said grade crossing daily between the hours of 7 o'clock A. M., and 7 o'clock P. M., and,

"Whereas, the City Council finds and so declares that the continued maintenance of said grade crossing is dangerous to life, limb and property, and that the safety, comfort, convenience and welfare of the public requires its elimination, and,

"Whereas, the City Council, after having opened negotiations with the officials of the said railway companies regarding the said grade crossing, did upon the suggestion of said railway officials, refer the matter to a joint body consisting of the City Manager, City Consulting Engineer, and the engineering representatives of the said Railway companies for the purpose of reaching an agreeable solution of the elimination of said grade crossing, and,

"Whereas, the Consulting Engineer of the City recommends the said grade crossing can best be eliminated by the building of an underpass, and has submitted plans covering same, and,

"Whereas, the railway engineers have submitted in addition to plan for an underpass, counter-plans for a bridge, and,

"Whereas, the City Council, after full and careful consideration, finds and so declares that an underpass instead of a bridge will better meet the needs, safety, convenience and welfare of the public, and that the same can be constructed for the same cost or less than the cost of a bridge, and,

"Whereas, the City Manager and Consulting Engineer report that they and the railroad engineers are substantially agreed upon a general plan for an underpass; be it therefore,

"ORDAINED BY THE CITY COUNCIL OF THE CITY OF DURHAM,

Section 1. That the grade crossing at Chapel Hill Street occupied and used by the Southern Railway Com-

pany, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, and occasionally by tenant roads of the said Southern Railway Company, is a menace to the public safety, is dangerous to life, limb and property, and the City Council finds and so declares that the safety, comfort and convenience and welfare of the public requires the elimination of said grade crossing by the construction of an underpass to take the place thereof.

Section 2. That the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, which said railway companies are now occupying and using tracks crossing the said Chapel Hill Street at grade, are hereby ordered and directed to eliminate said grade crossing by constructing an underpass with proper approaches in the place thereof.

Section 3. That the said underpass structure shall have a minimum overhead clearance of thirteen feet; that center supports, if used, must not be more than eighteen inches in thickness, the center line of which must be concentric with the center line of Chapel Hill Street, as established by the City Engineer; that the horizontal clearance between the center supports and the curb on each side shall not be less than twenty feet, that the sidewalks through said underpass shall not be less than six feet wide in the clear; that the abutment walls shall set flush with or back of the building lines as established by the City Engineer; that the finished surface of Chapel Hill Street at the apex of the crown shall not be lower than El. 383.5 as referred to the standard bench mark datum of the Engineering Department of the City of Durham; that solid non-leakable floors shall be provided in the super-structures, that the detail plans for said underpass shall be submitted to the City Engineer for his criticism and shall be approved by him before the beginning of construction work.

Section 4. That the active construction work on said underpass shall be started not later than sixty days from the adoption of this ordinance and same shall be completed within 280 working days thereafter.

Section 5. That this ordinance shall take effect from and after the 20th day of March, 1922."

That immediately after the adoption of this ordinance copies were served upon the railway companies. No attention was paid to it by the railway companies and they treated it with silent inaction. After the time fixed in the ordinance, the railways having taken no steps to obey, the City of Durham applied for a mandamus to enforce obedience to it. Upon the hearing of the application before the Superior Court Judge, he ruled that upon the pleadings no issue of fact for trial by jury was raised, and the railway companies offering no evidence before him, he found certain facts among them the following: "That the continued maintenance of said grade crossing is very dangerous to life, limb and property, is a menace to the public safety and detrimental to the comfort, convenience and welfare of the people; that the elimination of said grade crossing and the removal of this danger is necessary and required for the public safety of life, limb and property, and the comfort, convenience and welfare of the public and public safety requires and will be subserved and promoted by the construction of an underpass under said crossing with proper approaches thereto, all as is provided for in said ordinance above set out." Incorporated in and as a part of the judgment was the following: "The City of Durham agrees to do all underground work, such as the relaying and replacing of water, gas and sewerage mains, street paving including curbs and gutters and also side walks." The Railway Companies filed separate answers, but each contended that the ordinance of the City of Durham was (1) arbitrary, unreasonable and violated the constitutional rights of the railways as not due process of

law required by the Fourteenth Amendment of the Constitution of the United States; (2) was an unreasonable imposition and restraint upon interstate commerce, in which commerce all the railway companies were engaged and used tracks crossing Chapel Hill Street, and was in controvention of Article 1, Section 8, paragraph 3 of the Constitution of the United States; (3) was void because compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by subdivision (2) of Section 15a of the Act of Congress, known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of the 28th day of February, 1920; (4) that an overhead structure was more economical and less expensive; and that the underpass was a wasteful and uneconomical structure—the former estimated to cost $160,000.00—the latter $258,800.00, and it will be observed from the answers that in this latter cost is included the large cost of replacing and lowering sewer, water and gas mains, which expense is to be borne by the City of Durham. From the order of the Superior Court Judge of Durham County issuing the mandamus, the Railway Company appealed to the Supreme Court of the State, and from the judgment of that Court, affirming the order of the Superior Court, the Railway Companies have brought the case to this Court by a writ of error.

It is apparent from the above Statement of Facts, that the governing authorities of the City of Durham before acting gave the matter careful, full and painstaking consideration and endeavored to reach an intelligent conclusion.

ARGUMENT

The Railway Companies, Appellants, make in the record and brief of their counsel nine assignments of error to the judgment of the Supreme Court, of North Carolina but group these under three heads, to-wit:

1. The ordinance is arbitrary and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

2. The ordinance is void as in violation of the Commerce clause of the Constitution of the United States, Article 1, Section 8, paragraph 3.

3. The ordinance is void for that Compliance would not be efficient and economical management and reasonable expenditure for structures by the carriers as required by sub-division 2. Sec. 15a of the Interstate Commerce Act as amended by the Transportation Act.

1. The question whether the pleadings raised issues of fact to be tried by a jury was a question of local law and the construction of the statutes of the State by the Supreme Court of the State, is binding and conclusive, and is not reviewable by the Supreme Court of the United States.

Under the first group of errors assigned by the Railroad Companies in their brief, they assert error (p. 9) as follows: "A motion was made by the Railways and denied by the trial Court, to transfer the case to the civil docket for trial by jury. The Supreme Court of North Carolina affirmed the denial of this motion, holding that no issue of fact was tendered by the answers because they (Railways) qualified their admission of truth of the averments in paragraph 4 as to the volume of the traffic over this grade crossing,' thus disregarding the three federal issues tendered by the answers." What did the Supreme Court of North Carolina say upon this contention? At p. 243, 185 N. C. Rep., the Court said after quoting the statute of the State and commenting on it: "The contention of the defendants is that the answers raised issues of fact because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of traffic over this grade cross-

ing to the extent averred in paragraphs 4 and 8 of the complaint; but neither of these denials raised an issue of fact. Neither did the assertion in the answer that the underpass would be more expensive than a bridge, and therefore, that the action of the governing authorities of the City of Durham was arbitrary, unreasonable and oppressive. These defenses raised no issues of fact to be tried by jury, *and the latter* was a *question* of fact for the Court." The Court then followed this by the citation of authorities and a statement of what were *issues of fact* within the meaning of the statute, and what were mere evidentiary matters not constituting issues of fact. The Court said further: "The City made out a prima facie case when it showed the enactment and passage of the ordinance, which was admitted by the three railroads. The judge properly held that a presumption existed in favor of the validity of the ordinance, and the burden was upon the railroads to show otherwise, which they declined to do. The Judge was ready to hear and determine the action, but the railroads failed to offer testimony or evidence of any kind whatever. It did not devolve upon the City to prove that the crossing was blocked on the dates mentioned to the exact extent as alleged in the complaint, as the burden of proving the ordinance invalid or unreasonable was on the defendants either by showing that in fact the railroads did not block the crossing; that traffic was not impeded, and that the crossing was not dangerous. That the governing body exceeded its powers, or committed fraud and oppression, constituting a manifest abuse of discretion are questions of law for the Court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion, and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the Court. Crotts vs. Winston-Salem; 170 N. C., 27; Small vs. Edenton; 146 N. C. 527; Tate vs. Greensboro, 114 N. C. 399. There must be sufficient facts alleged to

show that the ordinance is unreasonable and oppressive before it can become an issue of fact for the jury." Further at p. 245, 185 N. C., the Court said: "The findings of Fact by the city in the exercise of its legislative and police power make out a *prima facie* case, and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness."

We have quoted at this length from the opinion of the Supreme Court of the State of North Carolina to answer the criticism upon it by counsel of the Railway Companies in their brief and to show that the criticism is undeserved. There was a tribunal ready to hear, but the Railway Companies rested their case upon the theory that they were entitled to have a jury pass upon the issues of fact, and when the Court ruled against them on this motion, they declined to offer any evidence to the Judge of the Court, who alone was authorized to pass upon any controverted question of fact and declare the law. The railway companies were given the opportunity by proof and argument to controvert the claim asserted against them before a tribunal that was bound to listen, ready to listen, and bound to give legal effect to what had been established. They chose to rely upon argument without proof.

It cannot be a denial of "due process of law" that under the construction of the statutory law of the State the questions are determinable by the Court without the intervention of a jury rather than by the jury.

The proper construction to be given to a State statute in itself involves no Federal question, but it is exclusively for the State courts to determine, even though the State court may have misconstrued the same.

Phoenix Insurance Company vs. Gardiner, 11 Wall. 204; 20 L. Ed. 112; Morley vs. Lake Shore & Michigan Southern R. Co., 146 U. S., 162; 36 L. Ed. 925; Lindsley vs. National Carbonic Gas Co., 220 U. S. 73; 55 L. Ed. 375; Jacobson vs.

Massachusetts, 197 U. S. 24; 49 L. Ed. 649; Olsen vs. Smith, 195, 195 U. S., 333; 49 L. Ed. 224; Palmer vs. Texas, 212 U. S. 118, 53 L. Ed. 435; Bartlett vs. Lockwood, 160 U. S., 357; 40 L. Ed. 455

2. The denial of a jury trial is not necessarily a denial of due process of law.

The plaintiffs in error contend that "a constitutional hearing was denied them because their motion for a trial by jury was denied." If this contention is not disposed of by the authorities already cited, then this court has held that a jury trial is not in all cases essential to due process of law.

Montana vs. St. Louis Min. & Mill Co., 152 U. S., 160; 38 L. Ed. 398; Marvin vs. Trout, 199 U. S. 212; 50 L. Ed. 157; Maxwell vs. Daw, 176 U. S. 581; 44 L. Ed. 597; Walker vs. Louvinet, 93 U. S. 90; 23 L. Ed. 678.

The case of Missouri Pacific Ry. Co. vs. Nebraska, 217 U. S., 196, 54 L. Ed. 727, cited in the brief of the plaintiffs in error is distinguishable from the instant case. As head-noted the Court held "the compulsory construction and maintenance by a railway company, under Neb. Sess. Laws 1905, Chap. 105, Sections 1, 6 at its own expense, and without a preliminary hearing, under penalty of a heavy fine for refusal, of the side tracks or switches necessary to reach grain elevators which may be erected adjacent to the right of way cannot be justified as an exercise of the police power, but such statute takes the property of the railroad company without due process of law, even if construed as operating only when demand for such facilities is reasonable." In commenting on the statute attached in that case, the Court said: "This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs, and, possibly with-

out regard to place. It is true that in the first of the present cases the Supreme Court of Nebraska discussed the circumstances, and expressed the opinion that the demand was reasonable, and that building the side track would cast no undue burden upon the road; and, in the second, it somewhat has definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed, as, by implication, confining their requirements to reasonable demands. On the face of it the statute seems to require the railroad to pay for side tracks whether reasonable or not,—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly, no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power. But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the State Court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason, and moreover even on this strained construction, they refrain from paying at the peril of a fine, if they turn out wrong in their guess that in the particular case the Court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act." It is apparent by comparing the facts in that case with the facts in the instant case, that the decision of this Court in the case from which we have quoted does not support the contentions of the Railway Companies, plaintiff in error in the instant case.

The case of Erie Railroad Co. vs. Public Utility Comrs., 254 U. S., 394, illustrates the distinction between the instant case and Pacific R. R. Co. vs. Nebraska, and confirms the

power exercised by the City of Durham and we think conclusive of all the questions presented by this appeal. In that case the Court said, quoting from Chicago M. & St. P. R. Co., vs. Minneapolis, 232 U. S., 430; 58 L. Ed., 671: "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out over their tracks or to carry their tracks over such highways." Missouri P. Ry. Co. vs. Omaha, 235 U. S. 121; 59 L. Ed. 157; Northern P. R. Co. vs. Puget Sound & W. H. R. Co., 250 U. S. 332; 60 L. Ed. 1013.

Further, this Court said in that case: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them additional claim to consideration. They are always the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and it necessarily frequents, the State, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be more dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares, must be taken to be the subject of implied limitation that it may be cut down whenever and so far as the safety of the public requires."

In the New Jersey case this Court held the power exercised obviously within the police power, in the Nebraska case clearly

beyond its limits. In the New Jersey case the power to determine the facts was delegated to a commission; in the instant case to the governing authorities of the City. It was not unconstitutional for the Legislature to delegate such powers to either a commission or board or the governing authorities of a town.

3. The ordinance is a reasonable exercise of the police power in the interest of the safety of the public.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish grade crossings, but also to build and maintain suitable bridges and viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

Chicago M. & St. P. R. Co. vs. Minneapolis, 232 U. S. 430, 58 L. Ed. 671, and cases cited. Erie Railroad Co. vs. Board of Public Utility Commrs., 254 U. S. 394, 65 L. Ed. 322; Atlantic Coast Line R. Co. vs. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

In their brief, plaintiffs in error, says (p. 9) in support of their contention that the ordinance of the City of Durham was arbitrary. "The railways did not assert from the Federal view-point (leaving out of consideration for the moment the contention that the Transportation Act had prescribed the rule to be followed in making such expenditures) that the council of the City of Durham lacked power to pass an ordinance *reasonably* calculated to promote public safety by requiring the separation of grades at a dangerous crossing: Erie Railroad Company vs. Public Utility Commissioners, 254 U. S. 394. Nor are we urging under this head that mere expense is the limit of the public power. The point that we do make under this first head is that, taking the answers as true, the underpass required by the ordinance is *unreasonable* and not that

due process of law imposed upon every exercise of State authority by the Fourteenth Amendment of the Federal Constitution."

Both the State Supreme Court and this Court have given the answer to this argument. The State Court in declaring "The findings of fact by the City in the exercise of its legislative and police powers make out a *prima facie* case and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness," and further that the Courts will not interfere with the statutory discretionary powers given to the governing authorities of the incorporated towns unless their action is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion.

Durham vs. R. R., 185 N. C. at p. 245; Lee vs. Waynesville, 184 N. C., 565; Newton vs. School Committee, 158 N. C. 186; Jeffress vs. Greenville, 154 N. C., 490; Rosenthal vs. Goldsboro, 149 N. C. 128; Ward vs. Commrs., 146 N. C. 534; Small vs. Edenton 146 N. C. 527; Tate vs. Greensboro, 114 N. C. 392; Broadnax vs. Groom 64 N. C. 244; Durham vs. Register 141 N. C., 128; Crotts vs. Winston-Salem, 170 N. C. 24; Dula vs. School Trustees 177 N. C. 426; Parks vs. Commrs. 186 N. C. 490, 498.

And this Court in declaring in Erie Railroad Co. vs. Board of Public Utility Commrs. supra, said: "If we could see that the evidence plainly did not warrant a finding that the particular crossing was dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses. The Courts of the State have confirmed its judgment. The tri-

bunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion, their judgment must stand. We cannot say they were not. At some crossings the danger was less than at others, but it was necessary, or at least prudent to proceed on a general plan. Upon the whole matter, while it is difficult to avoid the apprehension that the State officials hardly gave any weight to the situation of the company as a whole, in their anxiety for the well-being of the State, we are of the opinion that they did not exceed their constutional powers."

New York & N. E. R. Co. vs. Bristol, 151 U. S. 556, 38 L. Ed. 269; Washington Ex rel. Oregon R. & N. Co. vs. Fairchild, 224 U. S. 510, 56 L. Ed. 863; St. Paul M. & M. R. Co. vs. Minnesota, 214 U. S. 497, 53 L. Ed. 1060.

The railways, appellants, contend that the ordinance is unreasonable and arbitrary because the underpass required by it to be constructed is more costly by $160,000.00 than the overhead bridge suggested by them; that the latter will eliminate some drainage difficulties and will better enable the railways to use to the maximum their properties. The conclusive answer, we think, to these suggestions is that the railway companies had the opportunity to present testimony to the Court and upon any and all of these matters. The City of Durham did not contend nor did the Courts rule that the findings by the City authorities were conclusive. But the railway companies declined to present any evidence to the Court. They offered no testimony, oral or documentary, to remove or repel the prima facie effect of the findings of fact by the City authorities in the ordinance. The ruling of the Supreme Court that the findings of fact by the City authorities were prima facie correct, did not prevent the railway companies from offering evidence contra, nor did it prevent a full judicial

review of such findings, but obviously, we think, this could be done only upon some testimony or evidence offered by the railway companies.

In Wabash R. Co. vs. Defiance, 167 U. S. 88, 42 L. Ed. 87, the Court said: "While the modern policy of railway engineering usually tends to the abolition of grade crossings, there is no hard and fast rule upon the subject, and it may well be that the exigencies of a certain street or locality may demand that travel shall descend to the level of the railway rather than ascend to bridges built over the track, but, however, this may be, we are not at liberty to inquire whether the discretion vested in common counsel in determining this question was unwisely exercised; or what the motives were for making the change; or whether the crossing was an improvement or burdensome to the railroad company, or made unsafe the persons crossing the track. There were considerations which might be properly urged upon the common council as argument against the proposed change, but it is beyond the province of the Court either to praise the wisdom or criticize the unwisdom of such action. The question before us is simply whether the Council had the power to make the change, and of this we have no doubt."

In Fields vs. Barber Asphalt Paving Company, 194 U. S. 618, 48 L. Ed. 1142, the Court said: "As we have said, there may be cases of fraud or arbitrary abuse of power when the courts will intervene. Under other circumstances the municiality and property owners interested are bound by the acts of their agents, the authorities amply sustain this view."

The Supreme Court of the State having held that the city municipal authorities of the City of Durham, were vested with the power to require the elimination of the grade crossing and to determine at whose expense this should be done. This Court said in Missouri P. R. Co. vs. Omaha, 235 U. S. 121, 59 L. Ed. 157: "The broad authorities to require any railroad

Company to make such improvement in the interest of public safety, is conferred by the Legislature upon the city. The safety of the travelling public is the primary consideration and this is accomplished by the construction of the viaduct, which is used by many people who travel across the viaduct every day. The public, when being transported by the street railway company, was exposed to the dangers of a railroad crossing, which it was within the authority of the State to authorize the municipality to discontinue. Under competent legislation, the City has undertaken to do this. In placing the expense entirely upon the railroad company whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the State as has justified the Courts in some cases in enjoining the enforcement of State and municipal legislation."

In that case the Railroad Companies contend that a viaduct sufficient to carry the ordinary traffic of the street, could be constructed at a cost of about $30,000.00, whereas the viaduct ordered to be built would cost approximately $80,000.00.

In Powell vs. Railroad, 178 N. C. 245, the Supreme Court of North Carolina said: "The right of the city government, both under its police powers and the several statutes applicable to require railroads to construct bridges along streets running over the tracks, is fully established in this jurisdiciton and is recognized in well-considered cases elsewhere."

4. The ordinance, being valid does not violate the Commerce Clause of the United States Constitution, Article 1. Section 8, Paragraph 3.

In Erie R. R. Co. vs. Board of Public Utility Commrs., supra, 254 U. S., 394, 65 L. Ed., 322 this Court said, in speak-Board of Public Utility Commisisoners of New Jersey, in the ing of the elimination of grade crossings as ordered by the

City of Patterson: "That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitations that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagements in interstate commerce can take away this fundamental right of the sovereign of the soil."

In Denver & R. G. R. Co. vs. Denver, 250 U. S., 241, 63 L. Ed. 958, the Court said: "To engage in interstate commerce the railroad must get on the land; and to get on to it, must comply with the conditions imposed by the State for the safety of its citizens."

We cannot understand how the elimination of a grade crossing, either by overhead bridge or underpass for the street, can impede or burden in any way, interstate commerce or interstate traffic, or impair the usefulness of the railway companies for such traffic.

The plaintiffs in error recite in their brief the case of Kansas City Southern Railway Company vs. Kaw Valley Drainage District, 233 U. S., 75; 58 L. Ed. 857, but we think that the case is distinguishable from the instant case. In that case petitions for mandamus were filed by the Drainage District against two railways, to require compliance with an order of the Drainage District upon the railways requiring them to raise their bridges over the Kansas river to specified heights

and to remove the old bridges, which the railroads had refused to do, claiming that the order was an unreasonable restraint on interstate commerce.

That case having been brought to this Court on a writ of error to the Supreme Court of the State of Kansas to review the issuance of peremptory writs of mandamus requiring the removal of interstate railway bridges over a navigable stream, the Court said: "These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the Court, and of one authority, at least not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact. They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the states. . . . To destroy the bridges across which these railroad lines necessarily pass is at least as direct interference with such commerce as to prohibit the importation of cattle or oelomargarin, or the export of natural gas. (Quoting authorities.) Furthermore, in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helpful by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."

5. Plantiffs in error insist that the ordinance is void for that compliance with the same would not be that efficient and economical management and a reasonable expenditure for structures by the carriers as required by sub-division 2, Section 15a, of the Interstate Commerce Act as amended by Section 422 of the Transportation Act, approved February 28, 1920.

This act of Congress provides: "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; provided that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the Country."

It will appear from this amendment made by the Transportation Act of February 28, 1920, that it deals with the powers of the Interstate Commerce Commission in its adjustment and fixing of rates, and in determining and fixing reasonable rates the Interstate Commerce Commission should consider such expenditures as were reasonable under honest, efficient and economical management of the railroad companies engaged in Interstate traffic.

The plaintiffs in error, in the instant case seem to recognize it to be their duty to abolish the grade crossing at Chapel Hill Street, in the City of Durham, but only by an overhead bridge and that to comply with the ordinance of the City, the additional expense would be $100,000.00.

This amendment to the Interstate Commerce act was approved on February 28, 1920. The case of Erie R. R. Co. vs. Board Public Utility Commissioners, 254 U. S., 394, was argued before this Court on the 16th and 17th of November, 1920, and decided January 3, 1921, nearly a year after the

enactment of the Transportation Act. That case involved the elimination of a grade crossing in the City of Patterson, that, according to the record, would impose a burden of $200,000.00 upon one railroad company, a party to the suit, and practically bankrupt the same. Eminent counsel filed briefs and argued the case before this Court. It was not contended in that case that compliance with the order of the Public Utility Commissioners of New Jersey should be first submitted to and approved by the Interstate Commerce Commission, and to have it find that the expenditure of $2,000,000.00 by one of the roads was a reasonable expenditure to be made in an honest, efficient and economical management of the same, nor was this amendment now insisted upon called to the attention of the Court by the learned counsel appearing in that case. It would be rash to assume that it was overlooked by them, nor did this court advert in the opinion to that amendment, nor can it be assumed that Congress intended by this amendment to deprive the States, or sub-division of States, from legislating in the exercise of their police power on subjects vitally relating to the health, life and safety of their citizens.

Sherlock vs. Alling, 93 U. S., 99; 23 L. Ed. 819; U. S. vs. E. C. Knight Co., 156 U. S., 1, 39 L. Ed. 325; Pittsburgh & F. Coal Co. vs. Louisanna 156 U. S. 590, 39 L. Ed., 545; Plumly vs. Mass. 155 U. S., 461, 39 L. Ed. 223.

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